Supreme Court, U.S.
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No. 06-127

In the Supreme Court of the United States

FREEEATS.COM, INC.,

Petitioner,

v.

STATE OF NORTH DAKOTA EX REL.
WAYNE STENEHJEM, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of North Dakota

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether North Dakota Century Code § 51-28-02 governing prerecorded voice messages directed to North Dakota telephone subscribers is preempted by the Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) codified at 47 U.S.C. § 227, and the implementing rule adopted by the Federal Communications Commission, 47 C.F.R. § 64.1200(a)(2)(ii) (2005), as applied to interstate telephone calls.

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STATEMENT OF FACTS

The State of North Dakota ("North Dakota") and the United States Congress enacted legislation with identical consumer protection objectives: reducing intrusive and unwelcome prerecorded message telephone calls. Congress established minimum protections – gap-fillers for States without legislation. North Dakota, like many States, afforded its residents greater protections consistent with Congressional intent and the Supremacy Clause. Petitioner FreeEats.com, Inc. ("FreeEats") seeks to prevent North Dakota, a sovereign entity, from exercising traditional police powers to ensure the health, safety, welfare and privacy of its citizens.

1. Telephone Consumer Protection Act Of 1991

The Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 ("TCPA") amended the Federal Communications Act, 47 U.S.C. § 151, et seq. ("FCA"), to address telemarketing practices, including automated calls. "Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy." Pub. Law 102-243, 1991 S 1462, § 2(10)(December 20, 1991). See also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 18 FCC Rec. 14014, ¶137 (2003)("TCPA Order")(consumers complain about exemptions for noncommercial prerecorded calls).

"[W]e believe that the record demonstrates that telemarketing calls are a substantial invasion of residential privacy, and regulations that address this problem serve a substantial government interest." TCPA Order at ¶66; In re Telephone Consumer Protection Act of 1991 Automated Telephone Consumer Protection Act, S. Rep. 102-178, 1991 USCCAN 1968, 1972 (1991)("it is legitimate and consistent with the constitution to impose greater restrictions on automated calls than on calls placed by 'live' persons").

> Congress found that "residential telephone subscribers consider automated or prerecorded telephone calls ... to be a nuisance and an invasion of privacy." It also found that "[b]anning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion." Congress determined that such prerecorded messages cause greater harm to consumers' privacy than telephone solicitations by live telemarketers.

TCPA Order at ¶139 (quoting Pub. Law 102-243, § 2(12)(footnotes omitted)(emphasis added).

The TCPA granted the Federal Communications Commission ("FCC") authority to regulate such calls. The FCC chose not to ban prerecorded calls altogether, but instead allowed broad exceptions, e.g. calls not made for a commercial purpose and calls for a commercial purpose but which do not include unsolicited advertisements. See 47 CFR § 64.1200.

Fortunately for consumers, the TCPA "savings clause," 47 U.S.C. § 227(e)(1), confirmed or "saved" certain rights of the States, allowing them to continue to exercise traditional police powers.[1] States may pursue two courses of action without

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[1] 47 U.S.C. § 227(e)(1) reads:

(e) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits--

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

running afoul of federal preemption: States may impose more restrictive intrastate requirements or regulations on certain practices or the States may prohibit certain practices outright, whether the calls are inter- or intrastate in origin.

2. North Dakota's Do Not Call Law

In 2003 the North Dakota Legislature went the route Congress suggested, prohibiting unwanted prerecorded calls. It passed the "Do Not Call" law, which included NDCC § 51-28-02 (2003)[2]:

> **Use of prerecorded or synthesized voice messages.** A caller may not use or connect to a telephone line an automatic dialing-announcing device[3] unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. This section and section 51-28-05 do not apply to messages from school districts to students, parents, or employees, messages to subscribers with whom the caller has a current business relationship, or messages advising employees of work schedules.

Section 51-28-02, like the TCPA, is a consumer protection statute defending the privacy of consumers and preventing the

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(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

[2] FreeEats cites a more recent version of the statute, amended in 2005. Pet. App. 41a. North Dakota reproduces herein the text of § 51-28-02 as it existed at the time of the violations and enforcement action.

[3] "'Automatic dialing-announcing device' ["ADAD"] means a device that selects and dials telephone numbers and that, working alone or in conjunction with other equipment, disseminates a prerecorded or synthesized voice message to the telephone number called." NDCC § 51-28-01(1).

burdensome and annoying consequences of prerecorded calls.

> Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are "primarily, and historically, ... matter[s] of local concern," Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 719 ... (1985), the "States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons," Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 ... (1985)[.]

Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996); Fraternal Order of Police v. Stenehjem, 431 F.3d 591, 597 (8th Cir. 2005) cert. denied 126 S.Ct. 2058 (2006)(North Dakota's regulation of telemarketing advances a significant government interest, consumer privacy).

The FCC, discussing the implementation of the TCPA, declared, "[S]tates have a long history of regulating telemarketing practices, and we believe that it is critical to combine the resources and expertise of the state and federal governments to ensure compliance with the national do-not-call rules. Indeed, the TCPA specifically outlines a role for the states in this process. See 47 U.S.C. 227(e) and (f)." Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 68 Fed. Reg. 44144-01 at 44154, ¶53.

> Many state and consumer commenters note, however, that the TCPA contemplates a role for the states in regulating telemarketing and specifically prohibits preemption of state law in certain instances. States and consumers note that state do-not-call regulations have been a successful initiative in protecting consumer privacy rights. In addition, several commenters note the importance of federal and state cooperation in enforcing the national do-not-call regulations. The

> record also indicates that states have historically enforced their own state statutes within, as well as across state lines. The statute also contains a savings clause for state proceedings to enforce civil or criminal statutes, and at least one federal court [Van Bergen v. Minnesota, 59 F.3d 1541 (8th Cir. 1995)] has found that the TCPA does not preempt state regulation of autodialers that are not in actual conflict with the TCPA.

TCPA Order at ¶78 (emphasis added)(footnotes omitted).

North Dakota, and the Dakota Territory before it, has regulated aspects of telecommunications for 140 years, since before the invention of the telephone in 1876. See e.g. NDCC Chs. 49-02 and 49-21. As early as 1865 there were laws making injury to telegraph lines and interception of telegraph messages a crime. Laws of Dakota § 695 (Dak. Terr. 1864-65).

3. North Dakota's Enforcement Action

In August 2004 North Dakota received complaints about FreeEats' use of prerecorded messages. North Dakota sued FreeEats to enforce NDCC § 51-28-02 and prevailed at the trial court. North Dakota offered to stipulate to judgment for the equivalent of five violations (at $2,000 per violation) plus an amount for attorney fees and costs.[4] FreeEats accepted the offer and appealed the case to the North Dakota Supreme Court, which affirmed summary judgment.

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[4] In their Petition FreeEats quantifies for the first time its attempts to call "each of the 235,000 households in North Dakota with a publicly-available, listed telephone number." Pet. 8, n.4.

REASONS FOR DENYING THE PETITION

None of the considerations identified in Supreme Court Rule 10 are satisfied.

I. The North Dakota Supreme Court Decision Does Not Conflict With Prior Decisions Of This Court, The United States Courts Of Appeal Nor Any State Court of Last Resort

A. The Only Conflicting Decision On Point Is From A Single U.S. District Court

FreeEats argues, "The Supreme Court of North Dakota explicitly declined to follow the decision of the only federal court that has considered whether the TCPA saving clause avoids preemption of State laws that conflict with the statute as applied to interstate calls. (App. 26a (declining to follow Chamber of Commerce v. Lockyer, 2006 WL 462482[, 2:05-CV-2257-MCE-KJM] (E.D. Cal. Feb. 2[7], 2006)))." Pet. 12. Lockyer, an unpublished and unappealed U.S. District Court decision, does not present a conflict worthy of this Court's attention. For reasons of their own, the parties settled that case and stipulated to entry of final judgment. See Stipulation For Order Disposing of Pending Motions and Granting Permanent Injunction (May 31, 2006); Order Disposing of Pending Motions and Granting Permanent Injunction, 2006 WL 1629053 (June 9, 2006).

North Dakota's Supreme Court appropriately considered and rejected Lockyer: "The court's decision in Lockyer was premised upon its conclusion that the presumption against preemption does not apply and upon a strained reading of the language of 47 U.S.C. § 227(e)(1). We decline to follow Lockyer." State ex rel. Stenehjem v. FreeEats.com, Inc., 2006 ND 84, 712 N.W.2d 828 (N.D. 2006), Pet. App. 26a. The decision erroneously framed the issue as one of customary telecommunications regulation rather than as an issue of consumer protection and privacy. Had the question been properly framed as one of exercise of traditional State police

powers, the Lockyer court could not have dismissed the presumption against preemption as it did.

Lockyer rationalized its conclusion by saying its rendition of § 227(e)(1) avoids surplusage. Lockyer, 2006 WL 462482 at *8. The opposite is true; under the new interpretation the word "prohibits" becomes surplusage. If the statute merely "salvages" the State's right to apply "more restrictive" regulations on intrastate calls, then of what use is the word "prohibits"? A prohibition on intrastate calls would necessarily be a "more restrictive" State regulation, thus already allowed under the "salvaged" intrastate powers. The only way to avoid rendering "prohibits" surplusage is to apply it also to the remaining class of calls – interstate.

The intrastate language of § 227(e)(1) is not surplusage; it serves a purpose. With the Lockyer court's acknowledgment that there is no field preemption by the TCPA (2006 WL 462482 at *5), there is a logical explanation for the intra- and interstate distinctions. North Dakota's Supreme Court said:

> FreeEats contends that one important policy basis for enactment of the TCPA was to alleviate the excessive burdens which might be placed upon interstate telemarketers if they were required to comply with a plethora of conflicting regulations from all fifty states. In this context, there may be a substantial difference between the effect of state laws which seek to impose voluminous regulations upon interstate calls and those which wholly prohibit a specific class of interstate calls.

FreeEats.com, Inc., Pet. App. 11a. Under the TCPA a potential interstate caller need only know whether prerecorded calls are prohibited by a State's law. In States not prohibiting prerecorded calls, telemarketers can make calls consistent with TCPA regulations. But, if a State prohibits prerecorded calls, telemarketers simply must take care not to make prerecorded calls to that State. If 10 States prohibit prerecorded interstate

calls, that does not subject telemarketers to 10 different sets of State regulations. As a practical matter, this does not create any patchwork of inconsistent and confusing regulations from State to State.[5] Moreover, the provision gives guidance to States that engage in intra- and interstate-call regulation, and minimizes the potential of running afoul of conflict preemption, e.g. creating regulations which stand as an obstacle to the accomplishment and execution of the objectives of Congress.

B. The Supreme Court Cases Cited By FreeEats Are Not In Conflict

FreeEats claims the North Dakota Supreme Court decision conflicts with United States v. Locke, 529 U.S. 89 (2000) and City of New York v. FCC, 486 U.S. 57 (1988), which "establish the principles governing preemption of a State law that applies to interstate telephone service, an area long regulated at the federal level." Pet. 9-10. FreeEats fails to clearly identify the conflict. While both cases may contain some fodder for FreeEats' preemption arguments, neither is on point nor in actual conflict with FreeEats.com, Inc

In Locke, oil tanker operators sought relief from a State of Washington law providing for more stringent regulations governing tankers and oil spills. The issue was whether State regulations were preempted by the federal Ports and Waterways Safety Act of 1972, Pub.L. 92-340, July 10, 1972, 86 Stat. 424 ("PWSA"). The Court's holding was mixed. On the one hand, the Court held Title I of the PWSA allows a state to regulate its ports and waterways, so long as the regulation is based on the peculiarities of local waters and is not in conflict with federal law. However, under Title II of the PWSA only the federal government may regulate the design, construction,

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[5] This also addresses FreeEats' argument that the North Dakota Supreme Court's rendering of the statue leads to an absurd result. FreeEats.com, Inc., Pet. App. 11a.

alteration, repair, maintenance, operation, equipping, personnel qualification and manning of tanker vessels. Consequently, Washington's tanker regulations regarding general navigation watch procedures, English language skills, training and casualty reporting were preempted by Title II under a theory of field preemption. The Court remanded the case to determine whether the remaining regulations were allowed under Title I, i.e. based on the peculiarities of local waters and not in conflict with federal law.

FreeEats argues the North Dakota Supreme Court erred by not heeding Locke's conclusion that "an 'assumption' of nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence." Pet. 18. In fact, the North Dakota Supreme Court recognized that conclusion, applied it to the facts of the instant case and determined that the instant case - which involves the exercise of traditional police powers - did not warrant abrogation of the "assumption of nonpre-emption." FreeEats.com, Inc., Pet. App. 14a-16a. "As noted by the United States Supreme Court, when considering preemption a court must 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" Id. at 15a-16a (citing City of Columbus v. Ours Garage & Wrecker Serv., Inc., 536 U.S. 424, 432 (2002)(quoting Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991))). See also Medtronic, 518 U.S. at 485; Hillsborough County, 471 U.S. at 716; Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992); Bates v. Dow Agrosciences LLC, 544 U.S. 431, 448-49 (2005).

In Locke this Court found that in the field of maritime regulations there was more than just a "significant federal presence." It held "Congress has left no room for state regulation of these matters. See Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta, 458 U.S. 141 ... (1982)(explaining field

pre-emption)." Locke, 529 U.S. at 111. The North Dakota Supreme Court properly concluded the TCPA did not result in field preemption; accordingly it did apply the proper standard regarding "assumption of nonpre-emption."

FreeEats also argues that, under Locke, a "savings clause" should not be given broad effect where doing so would "upset the careful regulatory scheme established by federal law." Pet. 21. Again FreeEats' assertion begs the question. Here, "the careful regulatory scheme" established by Congress, and acknowledged by the FCC, includes a well-defined role for States to exercise concurrent jurisdiction in the dual State/federal system for regulating telecommunications. Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 360, 371, 375 (1986). See also Section III.B, infra.

In City of New York, cable television franchisors sought judicial review of FCC regulations establishing technical standards to govern the quality of cable television signals, squarely falling within the FCC's core mission to facilitate access and service to telecommunications. See e.g. Pet. 18-19 ("Section 1 of the Communications Act, 47 U.S.C. § 151, charges the agency with ensuring efficient, nationwide phone service. See Louisiana Public Service, 476 U.S. at 370."). The issue was whether the FCC exceeded its authority by preempting state and local technical standards governing the quality of cable television signals; the Court ruled it did not.

This Court noted the focus is on the agency and the proper bounds of its authority to undertake such action. If the agency's decision to preempt represents a reasonable accommodation of conflicting policies committed to the agency's care by statute, the accommodation should not be disturbed "'unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.' United States v. Shimer, 367 U.S. 374 ... (1961); see also [Capital Cities Cable, Inc. v.] Crisp, ... 467

U.S. [691 (1984)], at 700[.]" City of New York, 486 U.S. at 64.

In short, City of New York stands for the unremarkable proposition that where Congress intends to preempt State law, it may do so. Here Congress did not intend to preempt the State law at issue; there is no conflict.

C. North Dakota's Analysis Is Consistent With Two Other State Supreme Courts, Five United States Circuit Courts Of Appeal And At Least Two Federal District Courts

Not only is there no conflict between FreeEats.com, Inc. and any other State court of last resort nor U.S. Court of Appeals, there are several decisions at those levels which are in accord with, or support the reasoning of, the North Dakota Supreme Court decision.

The Utah Supreme Court in Utah Div. of Consumer Protection v. Flagship Capital, 2005 UT 76, 125 P.3d 894 (Utah 2005) ruled Utah's exercise of police power to impose restrictions on interstate call autodialers was not preempted by the TCPA.

Addressing whether the TCPA preempts application of state telemarketing laws to interstate telemarketing calls, the Supreme Court of Utah reasoned:

> Close examination of the Utah laws shows that they are not in conflict with the TCPA, nor do they stand as an obstacle to the accomplishment and full objective of federal law. We see no reason why telemarketing companies would be unable to comply with both the Utah laws and the federal statutes. This intention of the Utah legislature is made clear by Utah Code section 13-25a-103(4), which reads: "A person may not make or authorize a telephone solicitation in violation of Title 47 U.S.C. 227." The telemarketing standards set by our legislature are stricter than, but do not directly conflict with, the federal standards. A telemarketer who

> complies with the Utah standards will have little difficulty complying with the federal standards. Moreover, the record does not reflect that a national telemarketer would confront any substantial hardship by being required to determine which of its calls reach the telephones of Utah residents. Therefore, the Utah law does not force a telemarketer to conform its nationwide practices with Utah standards in order to prevent an inadvertent violation. The telemarketer can simply identify those calls that would be made to Utah and choose to not make those calls or to conform those calls to the Utah regulations. That the TCPA creates a uniform nationwide minimum set of prohibited telemarketing activities does not mean that Utah's heightened standard for companies wishing to make phone calls to this state conflicts with the federal scheme.

FreeEats.com, Inc., (quoting Flagship Capital, 2005 UT 76, ¶22 (footnote omitted)). Pet. App. 22a-23a.

Further, in Chair King, Inc. v. GTE Mobilnet of Houston, Inc., 184 S.W.3d 707 (Tex. 2006), the Texas Supreme Court primarily private enforcement of the unsolicited fax provisions of the TCPA. The court said "Section 227(e) [the savings clause] provides that the TCPA does not preempt state laws imposing more restrictive requirements or even prohibiting the use of telemarketing equipment." Id., 184 S.W.3d at 717. The Texas court continued, "First, we note that section 227(e)(1) is specifically titled "State law not preempted." 47 U.S.C. § 227(e)(1)(emphasis added). Furthermore, Congress's intent to supplement state legislation explains why the preemption concern would have focused on more aggressive regulation by the states." Id. at 718. "Congress clearly did not intend the TCPA to establish a ceiling if states decided to be more aggressive in their approach[.]" Id.

More than ten years ago, in Van Bergen v. Minnesota, 59

F.3d 1541 (8th Cir. 1995), the Eighth Circuit addressed TCPA preemption with respect to the Minnesota statute regulating automatic dialing-announcing device calls, and did so in the context of political calls in support of a gubernatorial candidate.[6] The case is almost exactly on point. The Eighth Circuit held the TCPA does not preempt State law prohibiting prerecorded messages.[7]

The Eighth Circuit comprehensively analyzed and rejected express, field and conflict preemption. Van Bergen, 59 F.3d at 1547-48. Moreover, it considered and rejected First Amendment arguments similar to those mentioned by FreeEats. Id. at 1550. Importantly, the Eighth Circuit concluded

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[6] Minn. Stat. § 325E.27 is virtually identical to NDCC § 51-28-02 and served as the model for the North Dakota law.

[7] Recognizing the fatal consequences of Van Bergen, FreeEats misstates the Record in this case, representing, "The record before the Supreme Court of North Dakota demonstrated that the calls at issue in Van Bergen were intrastate in nature." Pet. 24 n.8. That is simply not true. The lower court in Van Bergen said there was no evidence the plaintiff intended to connect his ADAD machine to telephone lines anywhere other than Minnesota, accordingly, he did not have standing to address the preemption issue on behalf of some unknown third party. Appellant's [Supreme Court of North Dakota] Reply Brief, Addendum at 10-13. Regardless, the Eighth Circuit was free to address the issue, and unequivocally did so. See e.g. Wilson v. Zoellner, 114 F.3d 713, 715 (8th Cir. 1997)(district court's decision on preemption is reviewed de novo because it is a question of federal law involving statutory interpretation). In Van Bergen, the Eighth Circuit addressed preemption as one of three threshold issues and concluded there was no preemption. Van Bergen, 59 F.3d at 1546.

Moreover, if it was true that the case only implicated intrastate calls, why did the Eighth Circuit go to the trouble of addressing and dismissing the preemption issue? If the calls were intrastate, the TCPA exception allowing for more restrictive intrastate regulations would, without question, have allowed Minnesota to do what it was doing - there would have been no reason for the Court to address preemption. The trial court adopted this reasoning in the instant case. App. 33a.

Congress enacted the TCPA as a "gap filler," not to preempt State law.

> The congressional findings appended to the TCPA state that "[o]ver half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operation; therefore, Federal law is needed to control residential telemarketing practices." 47 U.S.C. § 227, Congressional Statement of Findings (7). This finding suggests that the TCPA was intended not to supplant state law but to provide interstitial law preventing evasion of state law by calling across state lines.

Van Bergen, 59 F.3d at 1548.

The Fourth Circuit, in International Science & Tech. Inst., Inc., v. Inacom Communication, Inc., 106 F.3d 1146, 1153 (4th Cir. 1997) also held the TCPA does not preempt State law:

> In any event, International Science's preemption argument must be rejected at its beginning because Congress stated that state law is not preempted by the TCPA. See 47 U.S.C. § 227(e) ("nothing in this section ... shall preempt any State law that imposes more restrictive intrastate requirements ... or which prohibits" certain enumerated practices (emphasis added)).

International Science, 106 F.3d at 1153 (emphasis in original). The Fourth Circuit, and several other cases cited in this section, reached their conclusions using the same grammatical construction of the savings clause employed by the North Dakota Supreme Court and trial court, the construction FreeEats contends leads to an "absurd result." Pet. 20.

> The Eleventh Circuit adopted the Fourth Circuit's analysis: The Fourth Circuit rejected the argument that Congress intended to establish concurrent jurisdiction manifested through its preemptive occupation of interstate

> telecommunications for two reasons. Id. at 1153. First, it determined that even if the Act preempted substantive state law, the Act specifically provided for state courts to hear cases under the Act unless there was a contrary congressional intent. Id. Second, it noted that the Act specifically held that it did not preempt any state law that imposed more restrictive intrastate requirements or which prohibited certain practices. Id.

Nicholson v. Hooters of Augusta, Inc., 136 F.3d 1287, 1289 (11th Cir. 1998)(citing International Science).

The Fifth Circuit also adopted the reasoning of International Science:

> The history and purpose of this statute provide further support for the conclusion that Congress intended to confer exclusive jurisdiction upon the state courts. Congress enacted the TCPA as a supplement to state efforts to regulate telemarketing activities. This nonconsensual telemarketing activity was viewed by Congress as an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services. S. Rep. No. 178, 102nd Cong., 1st Sess. 1, 5 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1973. Congressional action was needed as states had no independent regulatory power over interstate telemarketing activities. Id., 47 U.S.C. § 227, Congressional Finding No. 7. By creating a private right of action in state courts, Congress allowed states, in effect, to enforce regulation of interstate telemarketing activity.

Chair King, Inc. v. Houston Cellular Corp., 131 F.3d 507, 513 (5th Cir. 1997).

The Third Circuit confirms the TCPA simply does not cast as long a shadow as FreeEats suggests and rejected field preemption:

> Furthermore, the statute does not appear to reflect any

> significant federal interest, or one that is uniquely federal. It does not reflect an attempt by Congress to occupy this field of interstate communication or to promote national uniformity of regulation. Rather, Congress recognized that state regulation of telemarketing activity was ineffective because it could be avoided by interstate operations.

ErieNet, Inc. v. Velocity Net, Inc., 156 F.3d 513, 516 (3d Cir. 1998)(emphasis added).

The five U.S. Courts of Appeals to address the TCPA preemption issue have come down against wholesale preemption. Congress intended to enhance State enforcement, not impair it:

> Indeed, from top to bottom, the private TCPA action reflects Congress' intent to enhance state sovereignty. Congress enacted the TCPA to assist states where they lacked jurisdiction; it empowered states themselves to enforce the TCPA in federal court; it authorized private enforcement exclusively in state courts; and it recognized state power to reject Congress' authorization.

International Science, 106 F.3d at 1158.[8]

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[8] See also Florida v. Sports Auth. Florida, Inc., U.S. Dist. Ct., M. D. Fla., Case No. 6:04-CV-115-Orl-JGG, Order (June 4, 2004) at 5-6 ("In other words, while the Sports Authority points to the TCPA as preempting the state-law unsolicited-sales-call and improper-use-of-prerecorded-messages claims against it, the TCPA itself expressly disavows any intent to preempt such claims. See 47 U.S.C. § 227(e)(1)(B), (C) and (D)")(emphasis in original); North Carolina v. Debt Management Found. Serv., Inc., U.S. Dist. Ct., E. D. N.C., Case No. 5:03-CV-950-FL(3), Order (March 8, 2004) at 16-17 ("Weighing further against complete preemption by the TCPA, the act explicitly recognizes several areas in which state law is not preempted. In particular, 'nothing in [the TCPA] shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits ... (C) the use of artificial or prerecorded voice messages[']")(emphasis in

II. The Issue Does Not Rise To The Level Of An Important Question Of Federal Law That Should Be Settled By This Court

Congress passed the Telephone Consumer Protection Act, not the Telemarketers Protection Act. As stated by FreeEats, "Since 1992, many States have adopted laws that restrict telemarketing calls to their residents, including calls with prerecorded messages. Many of these statutes apply to both interstate and intrastate calls, without distinction." Pet. 6. For 14 years telemarketers have been operating within these restrictions, apparently without the political process grinding to a halt and without the telemarketing industry collapsing in financial ruin. The FCC itself long ago prevailed against an attempt to declare TCPA restrictions on prerecorded messages invalid:

> That some companies prefer the cost and efficiency of automated telemarketing does not prevent Congress from restricting the practice. Kovacs v. Cooper, 336 U.S. 77, 88-89 ... (1949)("That more people may be more easily and cheaply reached ... is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open.").

Moser v. FCC, 46 F.3d 970, 975 (9th Cir. 1995), cert. denied 515 U.S. 1161 (1995). The same holds true for North Dakota's statute.

FreeEats turns the issue on its head, complaining North

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original)(citing 47 U.S.C. § 227(e)) and at 17-18 ("Accordingly, the court finds no clear intent on the part of Congress to prevent states from bringing state law causes of action against interstate telemarketers in state court."). The North Carolina case uses the same grammatical construction as North Dakota and reaches the same conclusion. Copies of the Orders are in the North Dakota Supreme Court Record on Appeal at #79. These two cases are also cited by FreeEats, but for different reasons. Pet. 26 n.17.

Dakota's Do Not Call law compromises the FCC's authority. The reality is that Congress, the source for all FCC authority, recognized the value of having States exercise traditional police powers in conjunction with the FCC's ability to deploy minimum protections for States which do not have their own statutes. This is consistent with long-established and well-founded principles of Federalism and the recognition of States as sovereign entities. The only question is whether Congress, invoking the Supremacy Clause and expressing its will through the TCPA, intended to prevent States from exercising police powers. The numerous courts approaching the issue, with the sole exception of Lockyer, find no such intent.

Complaints about the hypothetical destruction of "uniform national standards" are not supported by the record, nor are they persuasive. The Congressional findings of the TCPA do not mention uniformity. Pub. L. 102-243, § 2. See also United States v. Kimbell Foods, Inc., 440 U.S. 715, 730 (1979)(rejecting "generalized pleas for uniformity" as basis for creating federal common law). It is not enough to suggest the FCC would prefer uniformity. "To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do." Louisiana Pub. Serv. Comm'n, 476 U.S. at 374-75. The perceived administrative interest in uniformity ends where the State's interest in self-determination begins. U.S. Constitution, Amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people.").

FreeEats attempts to inflate the importance of this case by cloaking it in the mantle of free speech. In a rather cursory manner FreeEats mentioned the First Amendment at the trial court level; however, the issue was convincingly dispatched through summary judgment and FreeEats did not appeal the issue to the North Dakota Supreme Court. Pet. App. 33a-36a.

This is not a case about freedom fighters for democracy, this is a case about a trade group of telemarketers anxious to minimize accountability and maximize profits at the expense of compelling government interests such as the safety and privacy of its citizens.

Finally, it is worth noting FreeEats has a petition for declaratory order pending before the FCC on the very issue at the heart of this case – whether North Dakota's § 51-28-02 is preempted by the TCPA. Pet. 29. North Dakota believes the FCC should decide the question consistent with the various State Supreme Courts and federal Circuit and District Courts that have addressed it and not found preemption. The issue is still working its way through that process and, as the FCC decision is appealable to a Circuit Court of Appeals, it is reasonable to surmise the losing party at the FCC level will seek judicial review. 47 U.S.C. § 402.

Then, the Court of Appeals will decide either (1) there is no preemption, confirming FreeEats' Petition need not have been taken up by this Court at this time; or (2) North Dakota's law is preempted, setting up a much more apt Supreme Court Rule 10(b) question – three State courts of last resort having decided an important federal question in a way that conflicts with the decision of a United States Court of Appeals.

III. The Decision Of The Supreme Court Of North Dakota Is Well Reasoned And Correct

A. The Plain Language Of The TCPA Controls

The Supreme Court has concluded that "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the specific issue under consideration." Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 220 (2002) (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 261 (1993)). It is not a court's function "to find reasons for what Congress has plainly done," but rather the court's job is to "avoid rendering what Congress has plainly

> done . . . devoid of reason and effect." Great-West, at 217-18. It is for Congress, not the courts, to amend a statute if the plain language of the statute does not accurately reflect the true intent of Congress. See Dodd [v. United States, 125 S.Ct. 2478 (2005)], at 2483. As noted by the Supreme Court in Carter v. United States, 530 U.S. 255, 271 (2000)(citation omitted)(quoting Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 279 (1996)(Scalia, J., concurring)), when construing a statute a court must "begin by examining the text, not by 'psychoanalyzing those who enacted it.'"

FreeEats.com, Inc., Pet. App. 9a-10a (emphasis in original). North Dakota's Supreme Court correctly found the TCPA savings clause at 47 U.S.C. § 227(e) was unambiguous and its plain language allowed for enforcement of NDCC § 51-28-02.

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," Malone v. White Motor Corp., 435 U.S. [497 (1978)], at 505 ... "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. California Federal Savings & Loan Assn. v. Guerra, 479 U.S. 272, 282 ... (1987)[.]

Cipollone, 505 U.S. at 518. In the TCPA just such a provision can be found in the savings clause, where certain State rights are "saved" from preemption.

The TCPA provides options. States may impose more restrictive intrastate requirements or regulations on certain practices or States may prohibit those practices outright. Presumably a State could adopt more restrictive intrastate regulations but allow the TCPA to serve as the default for interstate calls; however, a State is not required to do so.

The savings clause, 47 U.S.C. § 227(e)(1), says:

(e) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits-- ... (C) the use of artificial or prerecorded voice messages

(emphasis added).

The North Dakota Supreme Court held:

> The word "or" is disjunctive in nature and ordinarily indicates an alternative between different things or actions. Reiter v. Sonotone Corp., 442 U.S. 330, 338-39 (1979). ... Terms or phrases separated by "or" have separate and independent significance. Reiter, at 338-39. Coupled with the comma preceding "or," which indicates a separate clause, the statutory language clearly creates two distinct and independent phrases. Thus, read logically and grammatically, the statute states that nothing in the TCPA preempts any state law "that imposes more restrictive intrastate requirements or regulations on" the enumerated classes of calls, and nothing in the TCPA preempts any state law "which prohibits" calls within the enumerated list. "Intrastate" unambiguously modifies only the first clause, not the second. If Congress had intended that the second part of the statute apply only to intrastate calls, "it could simply have said that." Great-West, 534 U.S. at 218. Because the statutory text is unambiguous, our inquiry into its meaning ends there. Bedroc [Ltd. v. United States, 541 U.S. 176 (2004)] at 183.

FreeEats.com, Inc., Pet. App. 10a-11a (citations omitted).

Congress could have easily indicated the "intrastate" language applies to both "more restrictive ... requirements and regulations" and "prohibits"; but, it did not do so. Inclusio unius est exclusio alterius - "the expression of one thing is the exclusion of the other."

> "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." United States v. Wong Kim Bo, 472 F.2d 720, 722 (CA5 1972). ... Had Congress intended to restrict § 1963(a)(1) to an interest in an enterprise, it presumably would have done so expressly as it did in the immediately following subsection (a)(2).

Russello v. United States, 464 U.S. 16, 23 (1983)(citations omitted). "Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States." Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 780 (1947).

In the Petition FreeEats offers another new reading of § 227(e)(1), this time purporting to find a contextual distinction between the use of the words "that" and "which" as in "nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits[.]" Petition 19-21. FreeEats argues, "This court's interpretation is based on an obvious grammatical mistake. Section 227(e)(1) does not introduce both clauses with the word 'that,' as would be required to create parallel clauses. Rather, it uses two different words, 'that' and 'which' to introduce these provisions; literally interpreted, the clauses are not parallel." This is a straw-man argument, set up by FreeEats just to knock down. In reality, the word "parallel" does not

appear anywhere in the North Dakota Supreme Court's decision; the concept is a false construct.

To frame the analogy more accurately, one would not characterize the clauses as "parallel" but rather "divergent" – one limited to intrastate calls the other covering both inter- and intrastate call. Further, FreeEats' proposed reading would render the words "or which prohibits" mere surplusage. Certainly an outright prohibition would be "a more restrictive intrastate requirement or regulation." There would be no need to add the redundant and superfluous phrase "or which prohibits." The FreeEats reading does not give effect to each word or phrase of the statute; it consciously ignores several.

In the Petition, FreeEats for the first time asserts the TCPA savings clause is ambiguous. Pet. 16. This is a 180-degree turn from its position in the Court below. At oral argument, in a colloquy with North Dakota Supreme Court Chief Justice VandeWalle as to whether the TCPA savings clause was ambiguous or clear, counsel for FreeEats admitted it was not ambiguous: "Well, your honor, I submit that it's clear and it's not ambiguous." See www.ndcourts.com/%5Fcourt/docket/20050171.htm, at hyperlink "Audio: Listen to recording of oral argument" at 3 minutes 00 seconds to 4 minutes 27 seconds into the recording of argument. The North Dakota Supreme Court noted, "FreeEats essentially ignores the language of the statute and bases its argument upon the contention that the legislative history demonstrates Congressional intent to preempt all state statutes affecting interstate calls." FreeEats.com, Inc., Pet. App. 10a. Even if, arguendo, the savings clause is ambiguous, the presumptions against preemption prevail. See Section III.C, infra.

Other provisions of the TCPA demonstrate Congress accepted separate State regulation. Section 227(b)(3) states, "A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State – "an action for violation of the TCPA. (emphasis added).

The TCPA directs that FCC do not call regulations "be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law." 47 U.S.C. § 227(c)(3)(J)(emphasis added). Also, "a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing systems that does not include the part of such single national database that relates to such State." 47 U.S.C. § 227(e)(2)(emphasis added). Section 227(f) gives Attorneys General authority to enforce the TCPA and saves their investigatory powers under State law. Section 227(f)(6) says, "Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State."

B. The FCA Does Not Preempt All State Regulation

The Federal Communications Act is not the monolithic preemptive force that FreeEats argues. It is riddled with exceptions to "exclusive" federal jurisdiction over interstate calls. See e.g. 47 U.S.C. § 253(b)("Nothing in this section shall affect the ability of a State to impose ... requirements necessary to ... protect the public safety and welfare ... and safeguard the rights of consumers.") and 47 U.S.C. § 332, allowing for limited State regulation of mobile phones.

The FCA contains a general savings clause, 47 U.S.C. § 414, "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." For example, the FCA does not preempt State law regarding invasion of privacy. Ashley v. Southwestern Bell Tel. Co., 410 F.Supp. 1389, 1392-93 (W.D. Tex. 1976). Laws forbidding telephone harassment, unfair, deceptive or fraudulent sales practices are not preempted. See e.g. Moriconi v. AT&T Wireless PCS, LLC, 280 F.Supp. 2d 867, 874-75 (E.D. Ark. 2003)(discussing "the overwhelming authority

declining to find complete preemption in the context of the FCA"); Pinney v. Nokia, Inc., 402 F.3d 430, 450 (4th Cir. 2005)("The presence of [§ 414] counsels against a finding that Congress intended to sweep aside all state claims in a particular area."). "The court in Castellanos v. U.S. Long Distance Corp., 928 F.Supp. 753 (N.D. Ill. 1996), took the import of the survival clause one step further and interpreted the clause to preserve state law claims alleging breach of the same duties that were created under the Act." DeCastro v. AWACS, Inc., 935 F.Supp. 541, 551-52 (D. N.J. 1996)(emphasis in original); see also City of Ellensburg v. King Videocable Co., 1993 WL 816526 (E.D. Wash. 1993); Lewis v. Nextel Comm., Inc., 281 F.Supp. 2d 1302, 1305 (N.D. Ala. 2003)(citing Smith v. GTE Corp., 236 F.3d 1292 (11th Cir. 2001))("the savings clause ... contemplates the application of state law and the exercise of state-court jurisdiction. ... If there is state-court jurisdiction the jurisdiction cannot be exclusively federal.").

In Head v. New Mexico Bd. of Exam'rs, 374 U.S. 424 (1963) the Court, citing § 414, rejected a preemption argument that would have prevented the State from regulating advertising just because the medium used was radio, ostensibly under the exclusive purview of the FCC.

> The nature of the regulatory power given to the federal agency convinces us that Congress could not have intended its grant of authority to supplant all the detailed state regulation of professional advertising practices, particularly when the grant of power to the Commission was accompanied by no substantive standard other than the "public interest, convenience, and necessity." The Solicitor General has conceded that the power of license revocation is not a plausible substitute for state law dealing with "traditional" torts or crimes committed through the use of radio. We can find no material difference with respect to the less 'traditional' statutory violation here involved. In the

> absence of positive evidence of legislative intent to the contrary, we cannot believe Congress has ousted the States from an area of such fundamentally local concern.

Head, 374 U.S. at 431-32 (emphasis added). In a concurrence, Justice Brennan recognized States' traditional police powers are not easily preempted.

> The New Mexico law is one designed principally to protect the State's consumers against a local evil by local application to forbid certain forms of advertising in all mass media. Such legislation, whether concerned with the health and safety of consumers, or with their protection against fraud and deception, embodies a traditional state interest of the sort which our decisions have consistently respected. Rice[v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).]

Id. at 445. See also Marcus v. AT&T Corp., 138 F.3d 46, 54 (2d Cir. 1998)("federal common law does not completely preempt state law claims in the area of interstate telecommunications"); In Re Universal Serv. Fund Tel. Billing Practice Litig., 247 F.Supp. 2d 1215, 1221, 1226 (D. Kan. 2002)(FCA does not completely preempt State fraud claims); Minnesota v. WorldCom, Inc., 125 F.Supp. 2d 365, 372 (D. Minn. 2000)(permitting attorney general lawsuit for false advertising of interstate long-distance services); A.S.I. Worldwide Comm. Corp. v. WorldCom, Inc., 115 F.Supp. 2d 201, 207 (D. N.H. 2000)("I cannot reasonably infer that Congress manifested a clear intention to occupy the entire interstate telecommunications field to the exclusion of any state regulation in that area.").

C. There Are Strong Presumptions Against Preemption

"We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal government, subject to only limitations imposed by the Supremacy Clause." Tafflin v. Levatt, 493 U.S. 455, 458

(1990). A court will not construe a federal statute to "upset the usual constitutional balance of federal and state powers" unless Congress "[made] its intention to do so unmistakably clear in the language of the statute." Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)(citations omitted). The presumption is stronger regarding administrative regulations.

> We are even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes. As a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence.

Hillsborough County, 471 U.S. at 717; see also New York Dept. of Social Services v. Dublino, 413 U.S. 405, 415 (1973). Merely because federal provisions are sufficiently comprehensive to meet the need identified by Congress does not mean States are barred from identifying additional needs or imposing further requirements in the field. Hillsborough County, 471 U.S. at 716. And, consumer protection laws enjoy an even greater presumption against preemption.

> Laws concerning consumer protection, including laws prohibiting false advertising and unfair business practices, are included within the states' police power, and are thus subject to this heightened presumption against preemption. (See California v. ARC America Corp. (1989) 490 U.S. 93, ... [unfair business practices]; Smiley v. Citibank (1995) 11 Cal.4th 138, 148, ... 900 P.2d 690 [consumer protection], affd. (1996) 517 U.S. 735[.]

Black v. Financial Freedom Senior Funding Corp., 112 Cal. Rptr. 2d 445, 452-53 (Cal. Ct. App. 2001).

D. There Is No Express Preemption

"[T]he question whether federal law in fact preempts state action in any given case necessarily remains largely a matter of statutory construction." L. Tribe, American Constitutional Law § 6-25, at 480 (2d ed. 1988); Guerra, 479 U.S. at 280 ("our sole task is to ascertain the intent of Congress."). There is nothing in the text of the TCPA supporting FreeEats' theory that Congress intended to preempt NDCC § 51-28-02. In fact, the heading of § 227(e)(1) is "State law not preempted." "The TCPA carries no implication that Congress intended to preempt state law; the statute includes a preemption provision expressly not preempting certain state laws." Van Bergen, 59 F.3d at 1548.

E. There Is No Field Preemption

Field preemption exists only "where the scheme of federal regulation is 'so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.'" Gade v. National Waste Mgmt. Sys., 505 U.S. 88, 98 (1972)(quoting de la Cuesta, 458 U.S. at 153). Federal occupation of a field is not easily accomplished:

> The principle to be derived from [our] decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.

Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963).

It cannot be said that as a matter of law the FCA preempts the field of telecommunications. Even Lockyer, supra, reached the same conclusion:

> Plaintiff's argument, that States are devoid of authority

> to regulate interstate telecommunications, is simply too broad. In fact, as expressly noted above, the Supreme Court recognized that such a clean parceling of responsibility is unworkable. Id. In addition, there are many examples of Congressional intent to reserve certain rights to the States. For example, the FCA expressly reserves the right to "impose ... requirements necessary to ... protect the public safety and welfare ... and safeguard the rights of consumers" to States. 47 U.S.C.S. § 253(b).

Lockyer, 2006 WL 462482 at *5.

TCPA field preemption was rejected in Van Bergen, 59 F.3d at 1548, "the preemption provision [47 U.S.C. § 227(e)(1)] makes it clear that Congress did not intend to 'occupy the field' of ADAD regulation, ... or to promote national uniformity of ADAD regulation, as it expressly does not preempt state regulation of intrastate ADAD calls that differs from federal regulation." (citation omitted).

F. There Is No Conflict Preemption

Conflict preemption occurs where compliance with both federal and State laws is a physical impossibility, Florida Lime, 373 U.S. at 142-43, or where State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). "The Court has observed repeatedly that pre-emption is ordinarily not to be implied absent an 'actual conflict.' See, e.g., Savage v. Jones, 225 U.S. 501 ... (1912)." English v. General Elec. Co., 496 U.S. 72, 90 (1990).

A state law is not invalid under the Supremacy Clause merely because it differs from federal law. See generally CTS Corp. v. Dynamics Corp., 481 U.S. 69 (1987). "Ordinarily, state causes of action are not preempted solely because they impose liability over and above that authorized by federal law." ARC America Corp., 490 U.S. at 105; see also Rousseff v. Dean Witter & Co., 453 F.Supp. 774, 782 (N.D. Ind.

1978)("where ... the state law enhances the primary and overall purpose of the federal law, it is not invalid under the Supremacy Clause.").

If it is possible to comply with both federal and state law, there is neither a conflict nor a frustrated purpose. See generally Rotunda, R. & Nowak, J., Treatise on Constitutional Law: Substance and Procedure, § 12 (2d ed. 1992 & Supp. 1993). The Eighth Circuit directly addressed, and rejected, conflict preemption between the TCPA and a law virtually indistinguishable from § 51-28-02. "It is clear that the Minnesota statute and the TCPA are designed to promote an identical objective, and that there is nothing in the two statutes that creates a situation in which an individual cannot comply with one statute without violating the other." Van Bergen, 59 F.3d at 1548. North Dakota's statute is virtually identical to the Minnesota Statute; the same result should obtain.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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